No. 10542

In the United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

HON. CLAUDE McCOLLOCH, *District Judge*.

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STEVENS-NESS LAW PUB CO., PORTLAND

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Hon. Claude McColloch, *District Judge.*

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Section 41(1), this being a suit between citizens of different states in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. The plain-

tiff is a citizen of Oregon (Paragraph II of the Complaint, page 3 of the Transcript of Record); and the defendant is a foreign corporation (Paragraph I of the Complaint, Tr. 2). The matter in controversy is whether or not the defendant is legally responsible for the personal injuries sustained by plaintiff as the result of falling to the floor of the lobby of the Congress Hotel in Portland, Oregon, on June 1, 1942, following a bodily contact with Genevieve Cline, a messenger girl employed by defendant, for which injuries the plaintiff claimed $7,500.00 general damages and $1,413.70 special damages (Paragraphs I to V, inclusive, of the Complaint, Tr. 2 to 5).

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court (Tr. 16-17) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

CONCISE STATEMENT OF THE CASE

This is an action to recover damages for personal injuries sustained by the plaintiff-appellee, I Bromberg, hereinafter called "Mr. Bromberg," through the alleged negligence of the defendant-appellant, Western Union Telegraph Company, hereinafter called "Western Union," acting by an employee.

On the first day of June, 1942, Mr. Bromberg, a man close to 87 years of age, resided at the Congress Hotel in Portland, Oregon. On that date, at about 3:30 P. M., one Genevieve Cline, hereinafter called "Genevieve," employed by Western Union to pick up and deliver messages in the downtown district of Portland, Oregon, was standing at the main desk in the lobby of the Congress Hotel, picking up or delivering a telegram. Mr. Bromberg came up and stood to the rear of Genevieve, either directly behind her or a bit to one side, waiting to step up to the desk and ask for his mail. Upon leaving her position at the hotel desk, Genevieve brushed or bumped into Mr. Bromberg, of whose presence she was not aware, following which contact he fell to the floor of the hotel lobby and sustained the injuries complained of.

In his deposition before trial, taken on December 7, 1942, Mr. Bromberg testified that Genevieve put her hands on his chest and threw him to the floor (Tr. 98-99). At the trial on March 11, 1943, Mr. Bromberg testified that Genevieve got a hold of his throat and pulled and gave him a forcible push causing him to fall to the floor (Tr. 54). Appellee's attorney repudiated both those versions, in the following language: "I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand" (Tr. 54).

The contention of Mr. Bromberg, as set forth in Paragraph II of his complaint (Tr. 3), is that Genevieve "carelessly, recklessly and negligently made a

sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described."

In its amended answer to the complaint, Western Union sets up two separate defenses (Tr. 5-6). The first defense is a denial of the material allegations of the complaint. The second defense is that Mr. Bromberg was guilty of contributory negligence, in that he carelessly and negligently, without warning or notice of any kind to Genevieve, placed himself in and remained in such a position in relation to her as to cause her to brush or bump into him when she turned to leave the hotel desk.

In conection with its first defense Western Union contends (a) that Genevieve was not negligent, and (b) that even if Genevieve were negligent in coming in contact with Mr. Bromberg, Western Union, as a matter of law, would not be liable to Mr. Bromberg, because the Congress Hotel lobby is a public place at which Genevieve was present in the exercise of a public right and was using only her body and not any vehicle or instrumentality furnished by Western Union.

In his complaint Mr. Bromberg alleged and asked for only $1,413.70 special damages by reason of being caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel chair (Paragraph IV of the Complaint, Tr. 4). At the Pre-Trial conference, and in the Pre-Trial order (Tr. 9),

which was signed and entered on the day of the trial, Mr. Bromberg alleged and claimed only $1,413.70 special damages. At the trial Mrs. Bromberg proved items in excess of the sum claimed, and judgment was given for him against Western Union for $1,760.70 special damages (Tr. 16). No motion was ever made to amend the complaint or the Pre-Trial order, and Western Union contends that in any event Mr. Bromberg should not have been given judgment for special damages in excess of $1,413.70.

The Pre-Trial order was made and entered on March 11, 1943 (Tr. 11). The case came on for trial on the same day. The testimony and proceedings at the trial are found on pages 26 to 116 of the Transcript of Record.

At the conclusion of Mr. Bromberg's case, Western Union moved to dismiss the action on the following grounds: (1) that there had been no negligence on the part of Genevieve; (2) that Mr. Bromberg was contributorily negligent; (3) that even if Genevieve were negligent, the rule of respondeat superior did not apply because she was at a place where she had a right to be on her own account; (4) that the testimony of Mr. Bromberg tended to show a deliberate act on the part of Genevieve (for which Western Union would not here be liable), rather than a negligent act, as alleged; and (5) that even if Genevieve were negligent, injury to anyone by her action was not reasonably foreseeable (Tr. 72-74).

The Court reserved its decision on this motion (Tr. 74). After the trial the Court announced its decision in favor of Mr. Bromberg. Findings of fact and conclusions of law were entered (Tr. 12-16), and judgment (Tr. 16) was made and entered on March 18, 1943, giving judgment to Mr. Bromberg against Western Union in the sum of "$2,500.00 as general damages" and the sum of "$1,760.70 as special damages," together with his costs and disbursements. Thereafter this appeal from the judgment was duly taken (Tr. 17-25).

SPECIFICATIONS OF ERRORS

(1) The trial court erred in finding that Genevieve was negligent and that negligence on her part proximately caused the injuries to Mr. Bromberg (Findings of Fact II, III and V, Tr. 14-15).

(2) The trial court erred in finding that Genevieve "made an abrupt turn and walked directly into and against" Mr. Bromberg (Findings of Fact II and III, Tr. 14).

(3) The trial court erred in finding that Mr. Bromberg was not guilty of any negligence (Findings of Fact IV, Tr. 14).

(4) The trial court erred in concluding that Mr. Bromberg was entitled to recover from Western Union any sum whatever, and in giving judgment against Western Union for any sum whatever (Conclusions of Law I, and Judgment, Tr. 16).

(5) The trial court erred in not granting Western Union's motion to dismiss the action (Tr. 72-74).

(6) The trial court erred in finding that Genevieve, in coming in contact with Mr. Bromberg, was acting for Western Union (Findings of Fact I, III and V, (Tr. 13-15).

(7) The trial court erred in finding that Mr. Bromberg was specially damaged in a sum of more than $1,413.70, and in concluding that Mr. Bromberg was entitled to recover from Western Union special damages in excess of said sum, and in giving judgment against Western Union for special damages in excess of said sum (Findings of Fact VII, Conclusions of Law I, and Judgment, Tr. 16), in view of the allegations of Paragraph IV of the Complaint (Tr. 4) and in view of the contentions of Mr. Bromberg as defined in the pre-trial order (Tr. 9).

ARGUMENT

In this action Mr. Bromberg seeks to recover damages from Western Union because of personal injuries sustained by him when he fell to the floor of a hotel lobby after a slight, unintentional and accidental contact by Genevieve, a seventeen-year-old Western Union messenger girl.

Of course, in such a situation, Western Union could be held liable only under the principle of *respondeat superior.*

Besides Mr. Bromberg and Genevieve, the only eye witness to the accident was Western Union's witness, James Lenhart, the head bell-boy and relief clerk at the Congress Hotel (Tr. 74-88). Mr. Bromberg's testimony in his deposition (Tr. 90-105) and at the trial (Tr. 52-54) was so vague, indefinite, contradictory, and incomplete that it can afford no basis for a recovery.

Mr. Bromberg's attorney was compelled at the trial to repudiate Mr. Bromberg's statements (made in his deposition before the trial and in his testimony at the trial) of a deliberate and intentional act on the part of Genevieve (Tr. 54). Genevieve's testimony that she did not know of the presence of Mr. Bromberg (or anyone else) behind her until she actually came in contact with him (Tr. 57-58, 63), stands uncontradicted. There were no other persons anywhere near them in the lobby (Tr. 58); and there were no pillars or other obstacles to be guarded against (Tr. 59). Genevieve, at the time of contacting Mr. Bromberg, was walking and not running (Tr. 57); and in walking away from the desk she had taken probably one step before she came in contact with him (Tr. 59). When she "brushed against him" (Tr. 57), the impact was so slight that she did not realize there was any possibility of injury to him (Tr. 62); and she had walked on a distance of ten feet before she heard him cry out (Tr. 76-79).

At the time of the accident, Mr. Bromberg was close to 87 years of age (Tr. 44), weighed about 130

pounds (Tr. 51), had impaired hearing (Tr. 36, 91), had fallen before (Tr. 93), walked unsteadily and did not lift his feet but shuffled along with a cane, and at times complained, "I am not walking as well as a baby" (Tr. 44). His physical incapacity was so obvious that a few months prior to the accident the management of the Congress Hotel suggested to Mrs. Hervin, Mr. Bromberg's daughter: "that Mr. Bromberg should not be left at the hotel unattended," that his movements were so slow that it was an inconvenience to the other guests, that they had to hold elevators for him to get on, that he should not be in a commercial hotel, that he was likely to stumble, and that "he probably would be better where there was someone to watch him and care for him" (Tr. 38-39). As a result of this conference, it was arranged for Mr. Bromberg to have his breakfasts in his room (Tr. 40).

It is the contention of Western Union that Mr. Bromberg failed as a matter of law to establish a cause of action, and that the evidence does not warrant a finding that Genevieve was negligent. Moreover, it would seem that under the circumstances of this case, Mr. Bromberg was, as a matter of law, guilty of contributory negligence in being unattended in a public place where there is always the likelihood of unintentional body contacts, and in coming up and standing so close behind Genevieve as to render some bodily contact highly probable when she moved from her position.

At the time of the accident, Genevieve was in a public place where she had a right to be independent-

ly of her employment and she was not using any instrument or vehicle furnished by her employer. This court may well wish to follow the line of authorities holding that the rule of *respondeat superior* should not be applied to hold liable an employer for the "negligent pedestrianism" of its employee, even if Genevieve was in fact negligent and Mr. Bromberg was in fact not guilty of contributory negligence.

In his complaint, Mr. Bromberg claims special damages of $1,413.70. His contention was renewed and repeated in the Pre-Trial order which became the basis of the proceedings at the trial. Without any attempt to amend his complaint, or amend the Pre-Trial order, which was made on the very day of the trial, Mr. Bromberg obtained a judgment for special damages in the sum of $1,760.70. If, under the federal rules of civil procedure, the Pre-Trial procedure is to have any validity and effect in defining the issues in a case, Mr. Bromberg, under the circumstances, should not, in any event, be permitted to recover more than $1,413.70 in special damages.

Before proceeding further, certain legal principles should be mentioned:

I.

NEGLIGENCE IS A FAILURE TO DO WHAT A REASONABLY PRUDENT PERSON WOULD ORDINARILY HAVE DONE UNDER THE CIRCUMSTANCES, OR DOING WHAT SUCH PERSON, UNDER EXISTING CIRCUMSTANCES, WOULD NOT HAVE DONE.

45 C. J. 628.
38 Am. Jur. 643.
Interstate Circuit v. LeNormand, 100 F. (2d) 160, 161.
Rice v. City of Portland, 141 Or. 205, 213; 7 Pac. (2d) 989; 17 Pac. (2d) 562.

II.

THE REQUIRED DEGREE OF CARE IS ALWAYS GRADUATED ACCORDING TO THE DANGER ATTENDING THE ACTIVITY BEING PURSUED.

45 C. J. 698.
38 Am. Jur. 677-8.
The W. D. Anderson, 17 F. Supp. 754, 758; affirmed 94 F. (2d) 377; c.d. 303 U.S. 658; 82 L. Ed. 1117; 58 S. Ct. 764.
Sullivan v. Mt. States Power Company, 139 Or. 282, 298; 9 Pac. (2d) 1038.
Peck v. Gerber, 154 Or. 126, 132; 59 Pac. (2d) 675.
Shobert v. May, 40 Or. 68, 70; 66 Pac. 466.
Carroll v. Grande Ronde Electric Company, 47 Or. 424, 433; 84 Pac. 389.

III.

IN ORDER FOR AN ACT TO CONSTITUTE NEGLIGENCE, IT MUST BE REASONABLY FORESEEABLE TO A PERSON IN THE POSITION OF THE ACTOR THAT HIS ACT WOULD RESULT IN SOME INJURY TO ANOTHER.

45 C. J. 651-2.
38 Am. Jur. 669, 678-9.
Mauney v. Gulf Refining Company, .. Miss...; 9 So. (2d) 780.
Bragg v. Dayton Company, 212 Minn. 491; 4 N.W. (2d) 320.

Shearman and Redfield on Negligence, Rev. Ed. 1941, Sec. 24, page 50.
Ford v. Grand Union Company, 268 N.Y. 243, 254; 197 N.E. 266.

In *Russell v. O. R. & N. Co.,* 54 Or. 128, 137; 102 Pac. 619, the Oregon Supreme Court declared:

> "A person is liable for any act the injurious consequence of which an ordinarily prudent man would be likely to foresee and guard against."

In *Leavitt v. Stamp,* 134 Or. 191, 197; 293 Pac. 414, the Oregon Supreme Court pointed out:

> "An injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable."

In *Lincoln Gas Company v. Thomas,* 74 Nebr. 257, 260; 104 N.W. 153, the Court said:

> "It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause such an injury as that complained of."

In *Morrison v. Burgess Company,* 70 N.H. 406, 408; 47 A. 412, the Court said:

> "A person is not in fault for not knowing particular facts unless circumstances exist which would put a man of average prudence upon inquiry."

As stated in Volume 2, Restatement of the Law of Torts, page 763:

> "In order that an act may be negligent, it is necessary that the actor should realize that it involves

a risk of causing harm to some interest of another, such as the interest in bodily security, which is protected against unintended invasion. But this of itself is not sufficient to make the act negligent. Not only must the act involve a risk, which the actor realizes, or should realize, but the risk which is realized, or should be realized, must be unreasonable."

As pointed out in *Aune v. Oregon Trunk Railway,* 151 Or. 622, 631, 51 Pac. (2d) 663:

"That a person is expected to anticipate and guard against all reasonable consequences, but that he is not expected to anticipate and guard against that which no reasonable man would expect to occur, is well settled."

In The Ellenor, 39 F. Supp. 576, 579; affirmed 125 F. (2d) 774, the Court said:

"One is expected to guard against only such dangers as a reasonably prudent person would be reasonably expected to anticipate. Clairvoyancy is not requisite."

38 Am. Jur. 670:

"In other words, the duty to use due care arises from probabilities, rather than from bare possibilities, of danger."

Ft. Smith Gas Company v. Cloud, 75 F. (2d) 413, 415.
Sander v. California-Oregon Power Company, 133 Or. 571, 576; 291 Pac. 365.

38 Am. Jur. 670:

"If the injury could not have been foreseen, it is attributed not to the actor but to the accident."

IV.

A PERSON IS NOT REQUIRED TO EXPECT THAT ANOTHER MAY BE UNABLE TO EXERCISE ORDINARY CARE FOR HIS OWN SAFETY, IN THE ABSENCE OF CIRCUMSTANCES PUTTING HIM UPON NOTICE OF SUCH CONDITION.

38 Am. Jur. 683.
Worthington v. Mencer, 96 Ala. 310, 315-16; 11 So. 72.

In 45 C. J. 704, it is said:

"In the absence of anything which should reasonably suggest such a condition, one is not required to anticipate that another may, for some reason, be unable to exercise ordinary care for his own safety, but the duty to exercise special care with respect to a person who is for any reason unable to take such care of himself as the normal person might, arises only where there is actual or imputed knowledge of the incapacity."

Under this principle, *even a common carrier,* which does not know of the infirmity of the injured person is held not liable:

Louisville, etc. v. Turner, 219 Ky. 92, 99; 292 S.W. 758, 761.
Cook v. Leavenworth, 101 Kan. 103, 107; 165 Pac. 803, 804.
Virginia Railway Company v. Boswell, 82 Va. 932, 936; 7 S.E. 383, 384.
International, etc. Co. v. Garcia, 13 S.W. 223, 224 (Tex.).
Bennett v. Metropolitan Co., 122 Mo. App. 703, 712; 99 S.W. 48.
Daily v. Richmond Railway Co., 106 N.C. 301, 307; 11 S.E. 820.

V.

IT IS THE GENERAL RULE THAT ONE WHO VOLUNTARILY PLACES HIMSELF IN, OR REMAINS IN, A POSITION WHICH HE KNOWS, OR WITH REASONABLE CARE SHOULD KNOW, IS DANGEROUS, CANNOT RECOVER FOR THE ENSUING INJURY.

Cooley on Torts (4th Ed.) Sec. 489, page 423.
Straight v. Western Lt. & Pr. Co., 73 Colo. 188, 191; 214 Pac. 397.

VI.

IF A PERSON "KNOWS THAT HE IS PHYSICALLY INFERIOR IN ANY PARTICULAR, HE IS REQUIRED TO USE HIS REMAINING FACULTIES WITH GREATER DILIGENCE."

Volume 2, Restatement of the Law of Torts, page 768.

As stated by the Oregon Supreme Court in *Weinstein v. Wheeler,* 127 Or. 406, 413; 257 Pac. 20; 271 Pac. 733:

"The blind and the halt may use the streets, without being guilty of negligence, if, in so doing, they exercise that degree of care which an ordinary prudent person similarly afflicted would exercise under the same circumstances."

It is said in 38 Am. Jur. 895:

"The fact that a person is afflicted with a physical disability requires him to put forth a greater effort for his own safety than one not disabled, in order to attain the standard of an ordinary

prudent man which the law has established for everybody * * * Those who are deficient in any one of their senses, must all the more diligently use the others. If, for any reason, a person is disabled to see or hear, he is bound to take extraordinary precautions in other ways. A deaf man must exercise his sense of sight with redoubled vigilance."

Muse v. Page, 125 Conn. 219; 4 A. (2d) 329.
Flynn v. Pittsburg Railway Company, 234 Pa. St. 335, 338; 83 A. 207; (near-sighted woman).
Toledo Railway Company v. Hammett, 220 Ill. 9, 13; 77 N.E. 72 (Deaf man).
Smith v. Cincinnati Railway Company, 146 Ky. 568, 572; 143 S.W. 1047. (Deaf man).
45 C. J. 996-7.

Shearman and Redfield on Negligence, (Rev. Ed. 1941), Sec. 107, pages 253-256:

"The plaintiff's own condition may be such as to seriously modify his duty with regard to self-preservation. If he is in the prime of life, active, alert and vigorous, far-sighted and clear headed, he may, without imprudence, take what might theoretically be considered a certain amount of risk, since he would be almost absolutely certain to place himself in no actual danger thereby. On the other hand, if he is old or infirm, lame, sick, or weak * * * he would not be justified in taking a risk which would be nothing to a vigorous and far-sighted man. In other words, every person must use that degree of care which prudent persons of his class, taking all circumstances into account, including health, strength, and habits of body and mind, would use, when acting prudently. * * * While it is a correct legal proposition that one suffering from mental or physical infirmity is only required to use ordinary care to avoid accidents, yet ordinary care in his case im-

> poses upon him an increased amount of care, proportioned to his disability, to overcome the greater liability to accidents incurred on that account. * * * Generally, they have the same right to use such highways as others, but in doing so they must exercise an increased degree of care, that is such care as persons of ordinary prudence, so afflicted, would use under like circumstances."

And, as stated in the same work, at page 254, referring to the care required to be used by an infirm person:

> "But if such person, knowing his incapacity, needlessly places himself in a position in which danger is probable, without means on his part to avert it, that is negligence. The incapacity of such a person to use care in one direction imposes on him the duty of exercising, for his own protection, a degree of care in other directions that will, as far as possible, compensate for his impaired senses or other disability."

Coyswell v. Oregon R. Co., 6 Or. 417, 424. (Deaf man).
Smith v. Sneller, 345 Pa. St. 68, 71; 26 A. (2d) 452. (Impaired vision).

VII.

THERE IS A LINE OF AUTHORITIES HOLDING THAT AN EMPLOYER IS NOT LIABLE FOR THE "NEGLIGENT PEDESTRIANISM" OF HIS EMPLOYEE.

Phillips v. Western Union Telegraph Company, 270 Mo. 676; 195 S.W. 711.
Ritchey v. Western Union Telegraph Company, 41 S.W. (2d) 628 (Mo. Appeals).
See *Wesolowski v. John Hancock Mutual Life Insurance Company,* 308 Pa. 117; 162 A. 166.

VIII.

A PLAINTIFF IS NOT ENTITLED TO RECOVER SPECIAL DAMAGES IN EXCESS OF THOSE ALLEGED IN HIS COMPLAINT, AND STATED IN THE PRE-TRIAL ORDER.

The Pre-Trial order "limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

Rule 16, Rules of Civil Procedure.

Stipulations at Pre-Trial proceedings are binding upon the parties and the subsequent course of the action is to be governed by the Stipulations, unless modified at the trial by the court to prevent manifest injustice.

Geopolus v. Mandes, 35 F. Supp. 276, 276-277.

Rule 9(g) of the federal rules of civil procedure provides:

> "When items of special damage are claimed, they shall be specifically stated."

This rule was applied in *Radio Electronic Television Corp. v. Bartniew Distributing Corp.,* 32 F. Supp. 431, 432.

This is simply an application of a familiar rule of pleading. *Smith v. Pallay,* 130 Or. 282, 290; 279 Pac. 279.

WAS GENEVIEVE NEGLIGENT?

In his complaint, filed September 16, 1942, Mr. Bromberg contended that Genevieve "carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described" (Complaint, Par. 2, Tr. 3). The Pre-Trial Order, made and entered March 11, 1943, defines the "Contentions of Parties" in part as follows: "The plaintiff contends that * * * said Genevieve Cline made a sudden and abrupt turn from said desk and walked directly into the plaintiff, knocking him to the floor * * *." (Tr. 8). The Trial Court, in its Findings of Fact, Par. II (Tr. 14), found that "after leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel." What is the evidence to sustain the allegations of Mr. Bromberg and the findings of the Trial Court?

There were only three witnesses to the accident—Mr. Bromberg, Genevieve and James Lenhart (the head bell-boy and relief clerk). John Goss, the bell-boy called by Mr. Bromberg as a witness, did not actually see the accident although he was in the hotel lobby at the time (Tr. 68). Likewise, the desk-clerk, Mr. Shelton, who was standing just across the desk from Genevieve and Mr. Bromberg, did not see the

accident (Tr. 60). The fact that the attention of neither Shelton nor Goss was attracted by the contact would indicate that it must have been very slight.

Mr. Bromberg's testimony in his deposition (Tr. 90 to 105) and at the trial (Tr. 52-54) was confused and contradictory. When his deposition was taken on December 7, 1942, he testified "I can't remember exactly about what happened" (Tr. 98). In response to repeated questions, he then testified that Genevieve "gave me a strong push in my chest and threw me to the floor" (Tr. 98). The unsuccessful attempts of Mr. Bromberg's own attorney and of the attorney for Western Union to have him tell how the accident happened are set forth on pages 94 to 105 of the Transcript of Record. At no time during this elaborate questioning by two attorneys at the taking of the deposition, did Mr. Bromberg state that Genevieve "made a sudden and abrupt turn from said desk." He stated that he was standing behind her and that she turned around and shoved him down (Tr. 100), and that she was walking, not running (Tr. 101).

At the trial on March 11, 1943, Mr. Bromberg was questioned carefully by his own attorney (Tr. 52-54), but at no time did he testify that Genevieve made a sudden and abrupt turn from the hotel desk. His testimony was "Well, I stood near that lady to wait, then she came close to me and just got a hold of my throat and pulled and gave me a forcible push and I fell with my floor—with my back to the floor and I broke my hip" (Tr. 54).

Mr. Bromberg's two versions of a deliberate assault and battery by Genevieve were repudiated by his own attorney in the following language: "I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand" (Tr. 54).

Mr. Bromberg's attorney was compelled to call Genevieve as plaintiff's own witness. Her testimony will be found on pages 54 to 67 of the Transcript of Record. Nowhere in her testimony will be found any evidence that she made a sudden and abrupt turn from the hotel desk or that she turned in any other than a perfectly normal way. Genevieve could not remember whether she turned to the right or left, but thought she brushed Mr. Bromberg before she had completely turned around while her head was turned away from him (Tr. 64). Genevieve testified that she was not in a hurry (Tr. 65), and that when she moved away from the desk she was walking, not running (Tr. 57). Mr. Bromberg was so close behind her that she took probably one step before she came in contact with him (Tr. 59). She did not know that anyone was beside or behind her until the contact (Tr. 57-58, 63).

James Lenhart, the only other eye witness to the accident, and who was standing a short distance away by the elevator, testified that Genevieve "turned I am sure to her left and kind of made a circle around him. * * * She turned and went around behind him and at that time she was between Mr. Bromberg and

myself. Now, she might have brushed him but if she did it was very lightly, because she went on right by him and he fell and she stopped * * *" (Tr. 76). "She was ten feet past him when he fell" (Tr. 79). Lenhart testified that at the time he was not aware that she had come in contact with Mr. Bromberg and that, although he was looking at them at the time, it did not appear to him that she and Mr. Bromberg actually came in contact (Tr. 77-78). Nowhere in his testimony does Lenhart state that Genevieve made a sudden and abrupt turn from the hotel desk, nor is it stated anywhere in the testimony that the movements of Genevieve were other than those of a reasonably prudent person.

Genevieve's testimony that she did not know that Mr. Bromberg or anyone else was standing near her is uncontradicted. Even if she had known that someone was standing behind her, there was certainly nothing in the situation to put her upon notice that the person was an enfeebled old gentleman unsteady on his feet. Genevieve had the right to expect that anyone in a public place, such as the lobby of a commercial hotel in a large city, would be able to withstand the almost inevitable brushing or jostling that occurs in public places.

Even if Genevieve had made a sudden and abrupt turn from the hotel desk, even if she had spun around, it was not reasonably forseeable that such action would cause someone to fall, because she did not know and had no reason to know that anyone was

behind her. The delivering of a telegram at a hotel desk is not such an inherently dangerous activity as to require a higher than ordinary standard of care.

As so aptly stated in 38 Am. Jur., page 670 (supra): "The duty to use due care arises from probabilities, rather than from bare possibilities, of danger."

And, as stated in *Mauney v. Gulf Refining Company*, ... Miss. ...; 9 So. (2d) 780, 780-1: "The rule is firmly established in this State, as in nearly all the common law States, that in order that a person who does a particular act, which results in injury to another, shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, (citing cases); but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable or extraordinary occurrence, although such happening is within the range of possibilities. * * * The area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameters of the circle and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which although foreseeable, were foreseeable only as remote possibilities,

those only slightly probable, are beyond and not within the circle—in all of which time, place and circumstance play their respective and important parts. * * The reasonable man, then, to whose ideal behavior we are to look as the standard of duty will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible."

The Minnesota Supreme Court states the rule this way, in *Bragg v. Dayton Company,* 212 Minn. 491; 4 N.W. (2d) 320: "If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all."

The testimony of all of the witnesses, including Mr. Bromberg himself, unites in establishing one central fact in this case, namely, that Mr. Bromberg was standing very close behind Genevieve. Lenhart, who was some distance away, standing by the elevator, testified that Mr. Bromberg "shuffled from the elevator over and stood behind the girl I should say about three feet behind her and just a little bit to the right" (Tr. 76). Genevieve testified that she could not say exactly how far behind her Mr. Bromberg was, but it was her best judgment that he was "about 2 or 3 steps * * * something like that" (Tr. 56); that he was standing "almost immediately" to her rear; and that she took probably only one step in walking away from the desk before she came in contact with him (Tr. 59). When his deposition was taken on December 7, 1942, Mr. Bromberg testified as follows (Tr. 104):

"Q. How far away from you was the girl when you were standing there waiting to talk to the clerk?

A. Right by the side of her.

Q. Would you say you were almost touching her? Were you that close?

A. I don't remember anything about close; right by her side.

Q. Not very far away? A. No.

Q. Would you say that you were as much as a foot away, twelve inches away?

A. Between?

Q. Yes.

A. I didn't know the measure, but I know I was close to her. It wasn't far.

Q. You were quite close to her? A. Close."

The testimony of all three of these witnesses shows that Genevieve came in contact with Mr. Bromberg in the very act of turning away from the desk, and that anyone, particularly a person without knowledge of the presence of Mr. Bromberg, in turning away from the desk in an ordinary and reasonable manner, would have come in contact with Mr. Bromberg. It would not be reasonable to require a person in the position of Genevieve to foresee and guard against the presence of a person in such close proximity, particularly a person so enfeebled as not to be able to withstand the inevitable contacts between pedestrians experienced in public places.

So, we say that the finding of negligence on the part of Genevieve is a misapplication of the law to the facts.

WAS MR. BROMBERG NEGLIGENT?

At the time of the accident Mr. Bromberg was close to 87 years of age (Tr. 44), slow and unsteady on his feet (Tr. 37-39). His daughter, Mrs. Hervin, testified "he wasn't what I would call strong. He used a cane and depended upon us often to give him our arm if he walked any distance * * *." (Tr. 27). Mr. Bromberg's hearing was impaired (Tr. 36; 91); and he sometimes walked with a sort of a shuffling or dragging of his feet (Tr. 37). He described that as "not walking as well as a baby" (Tr. 44). A few months prior to the accident, the management of the Congress Hotel, where he was living and where the accident occurred, suggested to Mr. Bromberg's daughter, Mrs. Hervin, that he should not be left at the hotel unattended. The manager "suggested that his movements were slow; that when he came to the elevator they had to wait; it was an inconvenience to some of the other patrons of the hotel, and that she thought it would be better probably if he stayed in a hotel that wasn't a commercial hotel" (Tr. 38). The manager indicated "that he probably would be better where there was someone to watch him and care for him * * * . They said he might be inclined to stumble over something" (Tr. 39). Of course Western Union regrets the accident and has the utmost

sympathy for Mr. Bromberg and his family, but Mr. Bromberg should have realized the risk he was taking in his enfeebled condition in mingling, unattended, with the people in the hotel lobby. His family, who had the care of him, were specifically warned of the danger a short while before the accident and yet they chose to permit him to remain at the hotel unattended, a danger to himself and a hazard to the public.

We have already referred to the testimony that Mr. Bromberg, without Genevieve's knowledge, came and stood very close behind her while she was at the hotel desk, and that she came in contact with him immediately upon turning away from the desk. We respectfully submit that when Mr. Bromberg, knowing his own enfeebled condition, placed himself so close behind Genevieve he was guilty of contributory negligence as a matter of law.

Knowing of his own weakened condition, Mr. Bromberg was required "to put forth a greater effort for his own safety than one not disabled." As a man whose hearing was impaired, he was required "to exercise his sense of sight with redoubled vigilance" (38 Am. Jur. 895). As a man who was old and feeble, he was not justified in taking a risk which would be nothing to a man who was vigorous (Shearman and Redfield on Negligence, Sec. 107, p. 253). How truly applies to him the language of the same text writers found on page 254: "If such person, knowing his incapacity, needlessly places himself in a position in

which danger is probable, without means on his part to avert it, that is negligence."

THE RULE IN THE PHILLIPS CASE

Mr. Bromberg is seeking to hold Western Union liable for the alleged negligence of its employee, Genevieve, in coming into contact with Mr. Bromberg as she was turning away from a hotel desk. Genevieve was not using any instrumentality furnished by her employer, such as a bicycle or automobile, at the time of the accident, but merely her own two feet. There are a number of cases holding that under such a state of facts the employer is not responsible, even if the employee be negligent.

In *Phillips v. Western Union Telegraph Company*, 270 Mo. 676; 195 S.W. 711, the Supreme Court of Missouri had before it an action for injuries suffered by a woman who was knocked down by a messenger boy. The boy, while engaged in delivering a telegram, snatched a newspaper from a newsboy, and, while running away with it, collided with the plaintiff. The court set aside a judgment for the woman, and stated (195 S.W. 712-713):

> "In going into the consideration of this case it is well to have in mind that the boy who caused the injury which is the subject of the suit was not traveling on the street by permission of his co-defendant, but in the exercise of a public right valuable to himself as a facility for gaining his livelihood as well as to his employer. Had he not possessed this right his employer could not have

conferred it nor taken it away. It went with his service as far as it was necessary to the performance of the duty involved, and no further. In all other respects and for all other purposes it remained his own. It was, like his health and strength, a part of his own equipment for the service in which he was engaged. We cannot arbitrarily assume that by the terms of his employment he was forbidden to seek, while on these trips, his own pleasure or profit in any manner consistent with the performance of his whole conventional duty, nor was the defendant under any obligation to so restrain his liberty of action, in the ordinary use of the public easement, although, should it authorize him to commit a wrong, as by inciting him to dangerous speed in a crowd, it would be liable for the consequences * * *.

"On the other hand, neither beasts or inanimate things participate in these public uses of their own right, but only have status in the public highway by right of their owners. * * * Had this boy been furnished by the defendant with a horse to ride or an automobile to transport him in the performance of his duties, his management of these facilities would have been the management of his master, which would have been liable for his acts and omissions in such management."

The *Phillips* case was followed by the Kansas City (Mo.) Court of Appeals in *Ritchey v. Western Union Telegraph Company,* 41 S.W. (2d) 628. In the *Ritchey* case a messenger boy ran out of the doorway of his employer's office and collided with and injured a woman walking along the sidewalk. The Court affirmed a judgment for the defendant and said:

"The facts in this case are in legal effect the same as the facts in the case of Phillips v. Western Union Telegraph Company."

In *Wesolowski v. John Hancock Mutual Life Insurance Company,* 308 Pa. 117; 162 A. 166, a boy on a bicycle was injured as the result of the negligent operation of an automobile by the defendant's employee. The defendant company did not furnish the car or require its use. The Supreme Court of Pennsylvania affirmed a judgment in favor of the defendant, notwithstanding a verdict for plaintiff, and held (162 A. 167):

> "In the case before us the defendant had no control over Adams' car. It was in no position to require him to use it, for the use of his car was no part of his contract of service. It could not direct him when, where, or how to drive his car. It had no more control of Adams' car in which he transported himself than it had of the shoes he used in walking from patron to patron. * * * If Adams had chosen to walk from person to person with whom he had his employer's business to transact and in walking he had negligently knocked over and injured another pedestrian, it could not reasonably be contended that his employer should respond in damages for Adams' negligent pedestrianism. So to hold would be to construe the phrase *'respondeat superior'* beyond its fundamental meaning and to carry its principle to absurd lengths and to consequences forbidden by every sound consideration of public policy."

EXCESSIVE SPECIAL DAMAGES

In his complaint, Mr. Bromberg alleged only $1,413.70 special damages by reason of expenses for hospital, nursing, physicians, X-rays, rest home, ambulance, and wheel chair (Par. IV of Complaint, Tr. 4).

At the Pre-Trial conferences, and in the Pre-Trial Order (Tr. 9), this claim of only $1,413.70 special damages was repeated. At the trial Mr. Bromberg proved an amount in excess of the sum claimed, and judgment was given for him for $1,760.70 special damages (Tr. 16). No motion was made to amend the complaint or the Pre-Trial Order, and we contend that Mr. Bromberg, in any event, should not have been given judgment for special damages in excess of $1,413.70.

Under the old practice in the Federal District Court, and certainly under the practice in the courts of Oregon, a plaintiff would not have been entitled to recover a larger sum in special damages than he had alleged in his complaint, even though he proved a greater amount at the trial, unless he amended his complaint.

Rule 16 of the Federal Rules of Civil Procedure authorizes Pre-Trial procedure for the simplification of the issues and for the consideration of such other matters as may aid in the disposition of the action. The rule then provides:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

In *Geopolus v. Mandes,* 35 F. Supp. 276, 277, the United States District Court for the District of Columbia held that stipulations at Pre-Trial proceedings are binding upon the parties and the subsequent course of the action is to be governed by the stipulations unless modified by the court to prevent manifest injustice.

Rule 9(g) provides:

> "When items of special damage are claimed, they shall be specifically stated."

This rule was applied in *Radio Electronics Television Corporation v. Bartniew Distributing Corporation,* 32 F. Supp. 431, where the United States District Court for the Southern District of New York held (page 432):

> "If the plaintiff has suffered special damages he should have alleged it."

We submit that orderly procedure requires that a plaintiff's recovery of special damages should be limited to the amount of special damages alleged in the complaint and in the Pre-Trial Order.

CONCLUSION

Mr. Bromberg is entitled to recover damages from Western Union only if he can establish that his injuries were the direct and proximate result of negligence of Genevieve, Western Union's employee, and not the result of his own negligence. Western Union was not an insurer of the safety of Mr. Bromberg.

What standard of care was demanded of Genevieve? Was she required to anticipate that an enfeebled old man, unsteady on his feet, would, without giving her any indication of his presence, take a position so closely behind her that in the very act of turning away from the desk she would contact him in a manner that would cause him injury? We can hardly believe that a reasonably prudent person in Genevieve's place could have foreseen the accident which is the subject of this action.

Mr. Bromberg knew of the presence of Genevieve, but Genevieve did not know of the presence of Mr. Bromberg. Mr. Bromberg knew that he was a man 87 years of age, slow of movement, and unsteady on his feet. He should have known that in placing himself so close behind Genevieve he was putting himself in a position from which he could not extricate himself in the event she made a sharp turn from the desk. He knew, or should have known of any danger that existed, but she did not and could not know.

We submit that Mr. Bromberg's unfortunate injury was the result, not of negligence of Genevieve, but of his own negligence. The judgment appealed from permits a recovery without a showing of actionable negligence. In legal effect it makes Western Union the insurer of the safety of this enfeebled old gentleman.

Even assuming that Genevieve was negligent and that Mr. Bromberg was not, there is authority for holding that her employer is not responsible for any negligence on her part in using her own legs and body in a public place where she had the right to be; and even assuming that Western Union were to be held liable in this case, judgment by way of special damages should not be for a greater sum than $1,413.70.

Respectfully submitted,

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